No. 87-2069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1. Should the Court overrule *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), holding that § 6 of the Railway Labor Act, because in terms and legislative history it only sets procedures for "change in agreements," does not bar a carrier from changing working conditions pending negotiation of a *first* agreement?

2. Did the court of appeals err in holding that the record did not show that the "drastic measure" (Pet. 12a) of a status quo injunction was "the only practical, effective means," *Chicago & North Western R.R. v. UTU*, 402 U.S. 570, 583 (1971), of enforcing TWA's duty under § 2 First of the Railway Labor Act to exert every reasonable effort to make agreements?

STATEMENT REQUIRED BY RULE 28.1

Trans World Airlines, Inc. ("TWA") has no parent company, nor any affiliates or subsidiaries not wholly-owned by TWA. The caption of this matter lists all parties to the proceeding.

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This is an action by a newly certified union for an injunction restraining a carrier under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., from changing rates of pay, rules, or working conditions during negotiations for a first collective

bargaining agreement.[1] The Court of Appeals correctly denied relief, both under § 6 of the RLA, 45 U.S.C. § 156, in reliance upon *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942) ("*Williams*"), which Petitioner asks the Court to overrule, and under § 2, First of the RLA, 45 U.S.C. § 152, First, in reliance upon *Chicago & North Western R.R. v. UTU*, 402 U.S. 570 (1971) ("*Chicago & North Western*"), which Petitioner essentially ignores. The case is only the second, apparently, in the 54-year history of the Railway Labor Act—*Williams* was the first—to present a union request to enjoin carrier alteration of status quo during a first negotiations as distinguished from a negotiations to change an existing agreement. The case presents no important question of federal law and no conflict with decisions of this Court.

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1 Specifically, the case involves the following two post-certification changes in working conditions only:

1. TWA's actual assignment of "ticket lift" and related passenger-boarding duties previously performed exclusively by passenger service employees, to flight attendants as well, announced March 7, 1986, the first day of a strike by the union representing TWA's flight attendants, and implemented July 1, 1986 (Pet. 7a; JA 659), by which date, as it happened, the NMB had conducted the mail-ballot election among the passenger service employees and certified the IAM as the winner of that election, and

2. the planned elimination of a bargaining unit position, reservation agent-in-charge, announced January 2, 1987 (Pet. 22a n. 8; JA 665).

REASONS FOR DENYING THE WRIT

I

WILLIAMS' HOLDING THAT THE STATUS QUO REQUIREMENT OF § 6 OF THE RAILWAY LABOR ACT DOES NOT APPLY DURING NEGOTIATIONS FOR A FIRST COLLECTIVE BARGAINING AGREEMENT SHOULD NOT BE OVERRULED

Section 6 of the Railway Labor Act, 45 U.S.C. § 156, contains two sentences and provides as follows:

> "§ 156. Procedure in changing rates of pay, rules, and working conditions.
>
> "*Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions*, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. *In every case where such notice of intended change has been given*, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board*, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(emphasis added). In *Williams*, which the IAM asks the Court to overrule, the Court held that the status quo requirement of § 6 did not apply in a case where "there was absolutely no prior history of any collective bargaining or agreement between the parties on any matter," *Detroit & Toledo Shore Line R.R. Co.*

v. UTU, 396 U.S. 142, 158 (1969) ("*Shore Line*"). The Court based this holding on the language and legislative history of the first sentence of § 6:

> ". . . *The crucial section 6 is phrased so as to leave no doubt that only agreements, reached after collective bargaining were covered.* Section 2, Seventh, first appeared in the 1934 amendments to the Railway Labor Act and section 6 was likewise then amended by adding 'in agreements' to that section's former requirement of notice of 'an intended change affecting rates of pay, rules, or working conditions.' Compare Sec. 6, 44 Stat. 582, with Sec. 6, 48 Stat. 1197. These additions point squarely to limiting the bargaining provisions of the Railway Labor Act to collective action."

(315 U.S. at 400) (emphasis added), pointing out that its conclusion was compatible both with the authority of a carrier "where no collective bargaining agreements are or have been in effect" and with the carrier's Railway Labor Act "duty to exert every effort to make collective agreements":

> ". . . *Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees* in the manner shown in this record. As we have stated in discussing the Jacksonville case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining.
>
> "*The institution of negotiations for collective bargaining does not change the authority of the carrier.* The prohibitions of section 6 against change of wages or conditions pending bargaining and those of section 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agreements. *Arrangements made*

> *after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.*"

(315 U.S. at 402-3) (emphasis added).

In *Shore Line*, wherein a union sought an injunction to restrain a railroad from establishing new outlying assignments at a time when the union had previously served a § 6 notice to amend the parties' agreement to forbid the railroad from making any outlying assignments at all (396 U.S. at 146), the Court held that the status quo requirement of § 6 included within its scope not only those working conditions covered in the parties' existing collective agreement, but "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute" (396 U.S. at 153). The Court based this holding on the language of the second sentence of § 6:

> "We note at the outset that the language of § 6 simply does not say what the railroad would have it say. Instead, the section speaks plainly of 'rates of pay, rules, or working conditions' without any limitation to those obligations already embodied in collective agreements."

396 U.S. at 148, and on the incompatibility of a contrary view of § 6 with "the overall design and purpose of the Railway Labor Act":

> ". . . More important, we are persuaded that the railroad's interpretation of this section is sharply at variance with the overall design and purpose of the Railway Labor Act."

(396 U.S. at 148).

In this case, the IAM asserts that *Williams* is inconsistent with *Shore Line* (Pet. 8), but in *Shore Line* itself the Court refuted any such assertion out of hand:

> ". . . it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6

> applied at all. The Court in *Williams* therefore never reached the question of the scope of the status quo requirement in a dispute, such as the one before the Court today, to which that requirement concededly applies."

(396 U.S. at 158). The present case, of course, like *Williams* and unlike *Shore Line*, involves only the question of whether the status quo requirement of § 6 applies at all.

The IAM appears to assert that *Williams* is inconsistent with *Chicago & North Western Ry Co. v. UTU*, 402 U.S. 570 (1971) (Pet. 11), but that was an action for a strike injunction under § 2, First of the Railway Labor Act. The status quo requirement of § 6 concededly did not apply in the case, because "the parties have exhausted the formal procedures of the Railway Labor Act: notices, conferences, unsuccessful mediation, refusal by the union to accept the National Mediation Board's proffer of arbitration, termination of mediation, and expiration of the 30-day cooling-off period of § 5, First, 45 U.S.C. § 155, First" (402 U.S. at 573-4). Nor does § 6 apply in the case at bar, as implicitly conceded, one notes, by the IAM's failure ever to give TWA a § 6 notice.[2]

The IAM also asserts that *Williams* is inconsistent with the principle of *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), and its progeny (Pet. 8-9). That was a refusal to bargain case, however, under Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5), the employer basing its refusal to bargain (for a first collective bargaining agreement) on the existence of previously executed individual one-year contracts of employment with 75% of the employees. Taking care "to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an

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2 Instead, following receipt of the NMB's certification of the IAM as the collective bargaining representative of TWA's passenger service employees, the IAM sent TWA a letter, neither invoking § 6 nor enclosing proposals, asking TWA "to meet . . . to set an agenda to commence negotiations" (JA 106). There is nothing wrong or lacking about IAM's letter. It is just that it could not be, because there was no agreement in place to change, and it was not, a notice of intended changes in an agreement pursuant to § 6.

act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment" (321 U.S. at 336-7), the Court modified and as modified affirmed a decree ordering the employer to bargain with the union upon request, and to cease and desist from:

> "Giving effect to the individual contracts of employment or any modification, continuation, extension, or renewal thereof *to forestall collective bargaining or deter self-organization*, or entering into any similar form of contract with its employees for any period subsequent to the date of this Decree *for such purpose or with such effect.*"

(321 U.S. at 341) (emphasis by Court). Thus, *J.I. Case*, like *Williams*, carefully accommodated both, on the one hand, the authority of an employer under a legal duty to bargain for a first collective bargaining agreement to continue to act unilaterally during the negotiations for that first agreement, and, on the other hand, the duty of the employer to bargain for a first agreement. Cf. *Caterpillar, Inc. v. Williams*, 481 U.S. ____, 107 S.Ct. 2425, 2431 (1987) ("Caterpillar is mistaken. First, *J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective bargaining agreement.").

The IAM goes on to argue that the Court applied the principle of *J.I. Case* to employees covered by the Railway Labor Act in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 582 (1944) (Pet. 9). That was an action by the union party to an existing collective bargaining agreement to enforce a Board of Adjustment award requiring the carrier to pay agents the compensation provided by the collective bargaining agreement, and holding that individual contracts providing a different rate of pay, which the carrier subsequently negotiated with agents without giving to the Union the 30 days written notice of intended changes affecting rates of pay required by the then (1930) Railway Labor Act, were ineffective. Enforcing the award, the Court said:

> "We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applica-

> ble, left the collective bargaining agreement in force throughout the period and that the carrier's efforts to modify its terms through individual agreements are not effective. The award, therefore, was in accordance with the law."

321 U.S. at 347. The case is therefore distinguishable on the same essential ground as is *Shore Line*, namely, that it involved unilateral changes by a carrier party to a collective bargaining agreement.

It should not occasion surprise that § 6 of the Railway Labor Act does not contemplate or provide for the case of negotiations for a first collective bargaining agreement. The 1934 Railway Labor Act, from which § 6 in its present form dates, "was negotiated and agreed to by the railroads and the Brotherhoods," *Burlington Northern R. Co. v. B.M.W.E.*, 481 U.S. ____, 107 S.Ct. 1841, 1852 n.13 (1987), and the Brotherhoods, in 1934, already represented most carrier employees. See 1 NMB Ann. Rep. 33 (1935) ("Of 909,249 employees on class I railroads, 646,169, or 71.1 percent, are covered by agreements with national and other trade unions; 218,885, or 24.1 percent, with system associations; and 44,195, or 4.8%, are dealt with on an individual basis without agreements.").[3] Least of all is there the claimed "pressing need" (Pet. 11) to overrule *Williams*. One, this is only the second case, apparently, in the history of the Railway Labor Act to present a claim of carrier alteration of status quo during a first negotiations. By contrast, there have been any number of cases, arising out of renewal negotiations, establishing that the RLA requires all parties both " 'to exert every reasonable effort to make and maintain' collectively bargained agreements, § 2 First, *and to abide by the terms of the most recent collective-bargaining agreement until all the settlement procedures provided by the RLA have been exhausted, §§ 5, 6, 10 . . . .*" *Burlington Northern R. Co. v. B.M.W.E.*, 481 U.S. ____, 107 S.Ct. 1841, 1851 (1987) (emphasis added). Two, the IAM has been and is free to bargain during the negotations over any unilateral change by TWA

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3 Airlines were not brought under the Railway Labor Act until 1936. Act of April 10, 1936, ch. 166, 49 Stat. 1189.

which the IAM disputes. That "an employer's unilateral change in conditions of employment under negotiation" would be an unfair labor practice under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), *NLRB v. Katz*, 369 U.S. 736, 743 (1962), does not, as the IAM suggests (Pet. 11, n.9), remotely require the same result under the Railway Labor Act, in light of "the differences between the statutory schemes," *Chicago & North Western*, 402 U.S. at 579 n.11, surely reflecting "the difference between the "embryo [labor] organizations in the industries covered by the NLRA and the already 'strongly organized' railway unions." *Bro. of R.R. Tr. v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 385 n. 20 (1969).

In sum, *Williams* has plenty of "vitality," notwithstanding the Court's comment in *Shore Line* that it "[was not] pausing to comment upon the present vitality of [the] grounds for dismissing the redcaps' Railway Labor Act claim [in Williams]" (396 U.S. at 158), and the Court should therefore decline, "at this advanced stage of the RLA's development," *Burlington Northern*, 107 S.Ct. at 1855, to overrule *Williams*.

II

THE COURT BELOW DID NOT ERR IN HOLDING THAT A STATUS QUO INJUNCTION WAS NOT REQUIRED TO ENFORCE TWA'S DUTY UNDER § 2, FIRST OF THE RAILWAY LABOR ACT TO EXERT EVERY REASONABLE EFFORT TO MAKE AGREEMENTS

§ 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, provides as follows:

> "First. Duty of carriers and employees to settle disputes
>
> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

> merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

In *Chicago & North Western*, a post-*Shore Line* case which the IAM by and large ignores, the Court held that the § 2, First duty to exert every reasonable effort to make and maintain agreements was judicially enforceable by injunction, "on a case-by-case basis" (402 U.S. at 577), only "when such a remedy is the only practical, effective means of enforcing the duty" (402 U.S. at 582, 587). The IAM nowhere claims that it was entitled to a status quo injunction under the *Chicago & North Western* test. Indeed, the IAM recognizes neither that the *Chicago & North Western* "case-by-case" test for a § 2, First injunction is the law, nor that the court below applied the *Chicago & North Western* test in reversing the prospective status quo injunction granted by the District Court.

Instead, the IAM irrelevantly and erroneously argues that the court below's decision is inconsistent with *Shore Line* (Pet. 12-13), the pre-*Chicago & North Western* case affirming the granting of an injunction not under § 2, First but under § 6. And the IAM erroneously attributes to the court below a holding that no § 2, First injunction can lie until and unless the parties have exhausted the procedures of § 6 (Pet. 13-4). The court below did not so hold; it held that the record—which showed that "the first steps [toward an agreement] had not yet been taken" (Pet. 12a), *i.e.*, that TWA had, at first, refused to bargain, but the District Court had then ordered TWA to bargain, and TWA had not appealed that order—did not support a finding that the "drastic measure" (Pet. 12a) of a status quo injunction was "the only practical, effective means" of enforcing TWA's duty to exert every reasonable effort to make agreements. That unnotable holding, leaving the parties under a common § 2, First duty to exert every reasonable effort to make and maintain agreements, presents no important questions, and no circuit court conflict, for this Court to review.

CONCLUSION

The IAM's petition for a writ of certiorari should be denied.

Respectfully submitted,

Dated: July 20, 1988

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